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October Term, 1978
No. 78-642

MILTON J. SHAPP, Governor; GERALD GORNISH, Attorney General; CARYL M. KLINE, Secretary of Education; GEORGE S. PULAKOS, Secretary of Transportation; LEONARD BACHMAN, M.D., Secretary of Health; KENT D. SHELHAMER, Secretary of Agriculture; MAURICE K. GODDARD, Secretary of Environmental Resources, and the GOVERNOR'S JUSTICE COMMISSION,
Appellants

v.

ROBERT E. CASEY, State Treasurer
and
THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA,
Appellees

On Appeal From the Supreme Court of Pennsylvania

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION OF APPELLEE, THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA, TO DISMISS OR AFFIRM

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Pursuant to Rule 16(4) of the Rules of the Supreme Court, appellants Milton J. Shapp, Governor, et al., here-

by file the within brief in opposition to the motion of appellee, the General Assembly of the Commonwealth of Pennsylvania, to dismiss or affirm the judgment entered by the Supreme Court of Pennsylvania. Appellants respectfully submit that the General Assembly has offered no argument which refutes the substantiality of the federal question raised in the Jurisdictional Statement, and that this Honorable Court should deny the motion to dismiss or affirm, note jurisdiction and entertain full briefing and oral argument on the merits.

ARGUMENT

A. This Appeal Involves Federal Programs

Under the guise of exercising control over the fiscal policy of the Commonwealth, the General Assembly, through the enactment of Acts 117 and 17-A of 1976, seeks to arrogate to itself the Executive Branch's power to determine how federal funds shall be allocated with respect to various federally-funded programs in which the Commonwealth participates. In the past, when the General Assembly purported to appropriate federal funds, the statutory language employed always was all-inclusive, providing a general allocation of all such funds received by the Commonwealth.[1] The consequence of such legislative language was not minimal fiscal control, as the General Assembly has suggested, but none at all. Indeed, the adoption of such language in 1961 in the General Appropriations Act had as much impact upon the utilization

[1] Such boiler plate phraseology was employed regularly from 1961 through 1975, as seen, for example, in section 8(b) of the General Appropriations Act of 1975, No. 8-A, 1975 Pa. Laws 650, 683:

> In addition to the amounts appropriated by this act, all moneys received from the Federal Government, or from any other source as contributions for the programs provided herein, or as payment for services or materials furnished by one institution to another, except those collections designated as revenues, shall be paid into the General Fund and are hereby appropriated out of the General Fund for the purposes of the respective appropriations.

of federal funds as the absence of such language in preceding General Appropriations Acts: executive agencies continued to use these funds to implement federally-funded programs in accordance with the provisions of the controlling federal statute.

In its counterstatement of the case,[2] the General Assembly creates a false dichotomy by categorizing federally-funded programs in the Commonwealth as either "state" or "federal", and by implying that "augmentation funds" properly fall within the legislature's appropriation power because they are utilized only in such "state" programs. Neither of the acts challenged by the Executive Branch recognizes any such distinction. Section 3 of Act 117 subjects *all* federal funds to the General Assembly's power of appropriation. Pa. Stat. Ann. tit. 72, §4613-(1a). The comprehensiveness of Act 17-A, entitled the Federal Augmentation Appropriation Act of 1976, demonstrates the General Assembly's intention to exercise this power over the entire spectrum of federally-funded programs administered by the Executive Branch. 1976 Pa. Laws 1383 et seq.

Equally invalid is the General Assembly's purported distinction between categorical grant and block grant programs as they relate to the Legislature's exercise of its appropriation power.[3] Section 5 of Act 117 expressly

[2] Motion of Appellee, the General Assembly of the Commonwealth of Pennsylvania, to Dismiss or Affirm, at 3, n. 1 .

[3] Id., at 9, n. 6. Categorical and block grant programs differ in the scope of the federal administrator's discretion to award grants, the scope of the recipient's discretion to use the grants and the nature and severity of the performance conditions attached to the grants. *See,* Advisory Commission on Intergovernmental Relations, ***Categorical Grants: Their Role and Design,***

provides that all federal funds, "whether designated as grants, augmentations, credits or otherwise . . .", shall be deposited in the General Fund and, except in specific limited circumstances, shall be appropriated by the General Assembly. Pa. Stat. Ann. tit. 72, §4615 (2a-3a). In accordance with this mandate, Act 17-A appropriated federal funds for such categorical grant programs as Medicare, Medicaid and the National Direct Student Loan Program as well as the block grant programs funded under the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C.A. §3101 et seq., and the Comprehensive Employment and Training Act, 29 U.S.C.A. §801 et seq. The latitude accorded state agencies in the administration of federally-funded programs thus bears no relation to the General Assembly's assertion of its appropriation power over these programs under Act 117.

Where Congress has intended to allow state legislatures to appropriate federal funds, it has specifically so provided. In order to qualify for revenue-sharing monies under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C.A. §1221 et seq., a state must assure the Secretary of the Treasury that: "It will provide for the expenditure of amounts received . . . only in accordance with the laws and procedures applicable to the spending of its own revenues." 31 U.S.C.A. §1243(a)(4). A similar provision governs the use of federal funds under Title II of the Local Public Works Capital Development

Washington, D. C., U. S. Government Printing Office, 1977, at 5-9. These differences are irrelevant, however, to the overriding purpose of all such programs, namely, the effectuation of Congressional policies through legislation enacted pursuant to its power under the General Welfare Clause of the Constitution, art. I, §8, cl. 1, by means of the expenditure of federal funds.

and Investment Act of 1976, 42 U.S.C.A. §§6701, 6725-(8).

None of the federal statutes relied upon by the General Assembly[4] contains any analogous provision which would empower a state legislature to treat federal monies as state monies subject to its appropriation power. Indeed, these statutes support appellants' contention that state executive agencies, not state legislatures, shall exercise control over the particular federal funds involved.

B. A Direct and Positive Conflict Exists Between State and Federal Law in This Case

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The reading given the federal statutes at issue by the General Assembly and the court below represents a monolithic view of state government which begs the very question of which branch, executive or legislative, has been designated by Congress to determine the allocation of federal funds at the state level. The provisions of Act 117, upheld under the Pennsylvania Supreme Court's construction of article III, §24, of the Pennsylvania Constitution, accord that power to the General Assembly (13a-21a). Federal laws, to the contrary, impart this authority to the Governor or various executive officials or agencies.

For example, section 203 of the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C.A. §§3701, 3723, provides that a grant to a state shall be

[4] Motion of Appellee, the General Assembly of the Commonwealth of Pennsylvania, to Dismiss or Affirm, at 6, n. 4.

utilized to establish and maintain a state planning agency which shall be subject to the jurisdiction of the chief executive of the state. The section further provides that such state planning agency shall develop a comprehensive statewide plan; define, develop and correlate programs and projects; and establish priorities. This provision of law could hardly be written with greater clarity to reflect that the grant is transmitted to the state agency under and subject to the jurisdiction of the Governor and that it is the agency which controls the plan and all expenditures thereunder.

Section 303 of the Act, 42 U.S.C.A. §3733, states that the Federal Government shall make grants to the state agency and that the comprehensive state plan shall "provide for the administration of such grants by the State planning agency." This section further provides that expenditures shall be made by such agency for the development and implementation of programs and projects in conformity with the state plan. Because this Act of Congress vests all of the powers and duties in the state planning agency and the grant is made to said agency for the specified enumerated purposes, the General Assembly is completely devoid of any power or authority over such grants.[5]

[5] Nor did the status of the General Assembly change when Congress amended the Act in 1976 to provide for an "advisory review" by the state legislature of the comprehensive plan prepared by the state planning agency. 42 U.S.C.A. §3726. The legislative history of this amendment confirms the continued control over LEAA funds to be exercised by the state planning agency. *See*, S. Rep. No. 847, 94th Cong., 2d Sess. 16, *reprinted in* [1976] U. S. Code Cong. & Ad. News 5374, 5381-82. Had Congress originally intended that LEAA funds should be subject to appropriation by state legislatures, the advisory review estab-

Similarly, Title I of the Elementary and Secondary Education Act of 1968 (ESEA), 20 U.S.C.A. §§241a, 241g, provides that, from the funds paid to it by the Commissioner of Education, each state educational agency shall, in turn, distribute amounts to local public educational agencies, operating state-approved programs. Moreover, the legislative history of ESEA emphasizes that the state agency is responsible for developing "such fiscal control and fund accounting procedures as may be necessary to assure proper disbursement of the federal funds paid to the State."[6]

Any doubt as to the existence of a direct and positive conflict between Act 117 and federal law must be dispelled in light of section 202 of the Intergovernmental Cooperation Act of 1968, 42 U.S.C.A. §§4201, 4212, which provides: "All Federal grant-in-aid funds made available to the States shall be properly accounted for as Federal funds in the accounts of the State." The purposes of the accounting requirements specified in the Act and in applicable regulations[7] are diametrically opposed to the concept that federal funds become state funds upon deposit in the State Treasury and that the General Assembly may appropriate them as it sees fit. Accordingly, Acts 117 and 17-A must be held invalid under the Supremacy Clause. *Townsend v. Swank*, 404 U.S. 282 (1971); *King v. Smith*, 392 U.S. 309 (1968).

lished by this amendment would have been superfluous and, indeed, would have been a limitation rather than an expansion of state legislative involvement in the LEAA program.

[6] S. Rep. No. 146, 89th Cong., 1st Sess., *reprinted in* [1965] U. S. Code Cong. & Ad. News 1446, 1452-53. *See also*, Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970, 42 U.S.C.A. §§4451, 4573 (State plan must designate single state agency to administer or supervise administration of state plan); Comprehensive Employment and Training Act of 1973, 29 U.S.C.A. §§801, 814, 815 (Prime sponsor must establish local planning councils and submit to Federal Government a comprehensive manpower plan); Intergovernmental Personnel Act of 1970, 42 U.S.C.A. §§4701, 4722(b)(1) (Governor must designate state office which will exercise primary authority and responsibility for development and administration of approved programs at the state level).

C. Wheeler v. Barrera Is Distinguishable

This Court's narrow holding in *Wheeler v. Barrera*, 417 U.S. 402 (1974), does not control the instant case. In *Wheeler*, the Court examined the legislative history of Title I of the Elementary and Secondary Education of 1968, *supra*, and concluded that Congress, by enacting 29 U.S.C.A. §1232a, sought to prohibit any arm of the Federal Government from becoming entangled in the substantive decisions affecting the curriculum, operation or personnel of local educational institutions or school systems. Given "the Act's policy of accommodating state law", the Court held that the expenditure of Title I funds must be done in such a way as not to run afoul of the Missouri Constitution's proscription against aiding any religious creed, church or sectarian purpose.[8] *Wheeler v. Barrera, supra* at 419.

[7] *See*, 34 C.F.R. §256 et seq.

[8] The proscription in article 9, §8 of the Missouri Constitution specifically applied to "any . . . school district", a direct limitation upon the state and local public educational agencies contemplated by Title I of ESEA, 20 U.S.C.A. §241g.

However, the Court repeatedly recognized in *Wheeler* "the intent of Congress to place plenary responsibility in local and state agencies for the formulation of suitable programs under the Act." 417 U.S. at 414, 424. Thus, the Court in *Wheeler* construed the relevant provisions of the Missouri Constitution as a restriction upon these state educational agencies, not a positive grant of authority to the state legislature to control Title I funds in accordance with its own policies.

Congress' aversion to the "federalization" of local educational policies in ESEA and to the "federalization" of local law enforcement in the Omnibus Crime Control and Safe Streets Act, *supra*,[9] is made manifest in the significant delegation of programmatic responsibility to the respective state planning agencies. The General Assembly's reliance upon this Court's opinion in *Wheeler v. Barrera* is thus misplaced.[10] That opinion reinforces, rather than undermines, appellants' contention that Acts 117 and 17-A of 1976 are an unconstitutional usurpation by the General Assembly of powers conferred upon Executive Branch agencies under federal law.

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[9] *Compare* the discussion of 20 U.S.C.A. §1232a in *Wheeler v. Barrera, supra* at 416 *with* the discussion of 42 U.S.C.A. §3766(a) in *Ely v. Velde*, 451 F.2d 1130, 1136 (4th Cir. 1971).

[10] Section 3 of Act 17-A of 1976 empowers the Secretary of the Budget to create a restricted receipt account for precisely those ESEA Title I funds which were at issue in *Wheeler v. Barrera, supra*. 1976 Pa. Laws 1383, 1420. Under section 5 of Act 117, Pa. Stat. Ann. tit. 72, §4615, (2a-3a), the creation of such a restricted receipt account would obviate the necessity for legislative appropriation of these funds in future years. This action by the General Assembly directly contradicts its asserted interest in exercising greater fiscal control over federal funding.

CONCLUSION

For the foregoing reasons, appellants respectfully request that Your Honorable Court deny the motion of the appellee, the General Assembly of the Commonwealth of Pennsylvania, to dismiss or affirm, and further, that the Court note jurisdiction, receive full briefs on the merits and hear oral argument to resolve the substantial question presented by this case.

Respectfully submitted,

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